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# Supreme Court of the United States

**No. 102.**

**October Term, 1950.**

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JAMES A. SULLIVAN,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK.

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## REPLY BRIEF OF PETITIONER.

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THE REPORTER COMPANY, INC., New York City—1950

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JAMES A. SULLIVAN,
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vs.
THE PEOPLE OF THE STATE OF NEW YORK.

## REPLY BRIEF OF PETITIONER.

This reply is filed under Rule 38, §4 (a) of the Rules of this Court, to show that petitioner was not accorded a fair trial.

On July 26, 1950, petitioner's application for a stay of execution and enlargement on bail was denied by Mr. Justice Burton without opinion.

Petitioner will have served his sentence before the Court reconvenes.

### I.

### The case is not moot.

Petitioner is convicted of three felonies (Penal Law, §2 [2]; *People v. Bellinger,* 269 N. Y. 265, 269; *People v. Hughes,* 137 N. Y. 29, 34; Penal Law, §2182; *People ex rel. Rodenberg v. Warden,* 154 App. Div. 473), and discharge from prison will not end his punishment. Under the New York law, if such conviction is upheld by this Court, it will entail continuing civil disabilities, e. g., rejection for a civil service appointment on the basis of conviction alone (Civil Service Law, §14 [4]); as a witness in a civil or criminal case, weight of his testimony

may be affected (Penal Law, §2444); in a criminal trial, he is subject to challenge as a juror (Code Crim. Proc., §375); loss of right to vote which can be restored by grace of pardon of the governor or by certificate of the board of parole (Election Law, §152 [2]). In default of a pardon, granting of certificate by parole board is discretionary and may not be sought short of five years after release or termination of sentence (Executive Law, §116 [3]; Resp. Br. p. 2). He may not be licensed as a private detective or investigator, nor be employed by either (General Business Law, §74 [2]); he may not be licensed to sell alcoholic beverages (Alcoholic Beverage Control Law, §110, §126 [1]).

Conviction on the first count entails a fine of $1,000 which must be paid to obtain release or time served in lieu of payment thereof (fol. 126). Hence, if this Court takes jurisdiction the recapture of the fine, if paid, remains (Civ. Prac. Act, §587; *People v. Cornell,* 65 Misc. 452, affd. 138 App. Div. 915; *People v. Abramowitz,* 132 Misc. 18; *People v. Miller,* 196 N. Y. Supp. 904; 3 Op. State Compt. [N. Y. 1947] 161). Whether time is served or fine is paid, the case is not moot.

Therefore, under the doctrine of this Court in *St. Pierre v. U. S.,* 319 U. S. 41, and *Fiswick v. U. S.,* 329 U. S. 211, 221-223, the case is not moot.

## II.

### Inaccuracies and statements *dehors* the record in the brief of respondent.

The statements on pages 7 and 8 that petitioner constructs his argument that the Trial Judge was disqualified on Exhibit F, is not the fact. There is no argument addressed to that exhibit, nor is it referred to, in the brief of petitioner; nor are folios 414 and 3941 mentioned in the petition, brief or argument.

The argument on pages 4, 6 and 8 concerning the so-called S. P. Fisher letters, omits to state that they are not substantive proof of guilt and are not to be so used. The Court so charged (fols. 3634, 3635). In view of the verdict, there can be no reasonable doubt that they were used as substantive evidence of guilt. But that instruction, it will be noted, covers a larger area than the Fisher letters. It includes the "surrounding circumstances." They include the following exhibits: 1 (fols. 3748-3750, 186, 191), 2 (fols. 3754-3756, 197-198, 207, 272), 3 (fols. 3760-3762, 225, 229), 4 (fols. 3766-3768, 232, 236), 5 (fols. 3772-3774, 239, 242), 7 (fols. 3778-3780, 253-258, 444), 8 (fols. 3784-3785, 324-327), 9 (fols. 3786, 259, 261), 13 (fols. 3808-3810, 448, 450), 14 (fols. 3814-3816, 446-447), 20 (fols. 3826-3828, 635, 626, 639), 25 (fols. 3844-3846, 790, 1293-1295, 1132, 1294). Of them, Exhibits 1, 2, 4, 5, 13 and 14 refer to the telephones of the Democratic Club, which is clearly not in issue here, not even as evidence of plan and design, nor as an attendant circumstance (fols. 3634-3635). The balance refers to Maritime Oil Company. All, excepting No. 20, were produced by the telephone company as its own records, and were admitted in evidence under §374-a of the Civil Practice Act, subject to being connected. But none of them was, any more than was Exhibit 23 (fols. 3832-3834, 784), which was ad-

mitted with the same qualification (fol. 784), which, too, was never met (Main brief, Points II and III). Moreover, Exhibits 8, 9 and 25, were not presented to the telephone company by petitioner nor by anyone at his instigation (fols. 2652, 2829-2831). On Counts one and three, the verdict could not have been reached unless the jury surmised such connection.

Coming to the statute, §374-a, *supra,* it appears to be a modification of the shop-book rule, but its purpose has not been changed (*Johnson v. Lutz,* 253 N. Y. 124, 126 *et seq.*). Nor, in a criminal case, as it was here, can it be used to hypothesize guilt (*People v. Rubin,* 286 N. Y. 56, 59). These are not only legal errors, properly addressed to an appeal (*People v. Mullens,* 292 N. Y. 408, 418), but in the context and setting of this case go farther, and deprive petitioner of due process (*Tot v. U. S.,* 319 U. S. 463, 468-470; *Morrison v. California,* 291 U. S. 82, 90, 91). Whatever probative value the exhibits have under the statute, *supra,* rests in pyramiding inference upon inference (*People v. Razezwicz,* 206 N. Y. 249, 270, 271).

Testimony of the witnesses Garrity and Hudak, do not connect petitioner with the crimes. Their acts were not authorized by petitioner (*People v. Kress,* 284 N. Y. 452, 464). The testimony of the former is included between pages 334 and 370 and the latter between pages 370 and 377, of the record.

The argument on page 8 that there is a lack of evidence of a record in the office of the district attorney of facts connected with the investigation, and on page 11 that the crimes charged were not under investigation prior to January 1, 1946, and that no action was taken by the district attorney in 1945, are all *dehors* the record. As to the latter, Exhibit K (fols. 3964-3966) is dated August 9, 1945, near the top thereof, and at the bottom

appears the date of October 26, 1945. Therefore, in 1945, there was activity by the district attorney as that exhibit discloses. As to the former, the Trial Judge admitted the existence of the factual basis of the motion to disqualify (fol. 755). Therefore, the State, to protect the jurisdiction of the County Court, should have produced the records or offered evidence of them. It did not accept that proper burden. To have done so, would have flown in the face of the undisputed testimony. It is also *dehors* the record where it is argued at page 11, that the crimes charged are not shown to have been known to anyone until after February, 1947, and were not under investigation prior to January 1, 1946. The respondent knows better than that (fols. 749-750). The reasons given above apply to the argument at page 11.

## III.

**Respondent's concession of its own contradiction of its witness, Balog.**

This refers to page 14, that the testimony of Balog that he was given the information by the district attorney that he had filed the Maritime certificate contradicts all of his direct testimony in all of its details, if that testimony were given. The record speaks for itself and certification thereof attests its verity. The testimony was clearly inadmissible as substantive evidence of guilt (*Bullard v. Pearsall,* 53 N. Y. 230, 232). The *Zigouras* and *Buchanan* cases, cited at pages 19 and 20, are clearly to be distinguished. In them the matter upon which the witnesses were permitted to be recalled and examined, pertained to new matter brought out on cross examination, that is, the opposing party had made the witnesses his own, which is not the instant case. Cross examina-

tion here was aimed at the direct examination and the concession concedes it so to have been. The contradiction of the witness is not inferential but direct.

Respectfully submitted,

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